Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 454**

IN THE MATTER
OF
MASSACHUSETTS CANDY & TOBACCO DISTRIBUTORS, INC.

DISPOSITION AGREEMENT

This Disposition Agreement (Agreement) is entered into between the State Ethics Commission (Commission) and Massachusetts Candy & Tobacco Distributors, Inc. (MCTD) pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On April 13, 1992, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by MCTD. The Commission has concluded its inquiry and, on June 16, 1992, by a majority vote, found reasonable cause to believe that MCTD violated G.L. c. 268A, §3.

The Commission and MCTD now agree to the following findings of fact and conclusions of law:

1. MCTD is a Massachusetts non-profit corporation incorporated under G.L. c. 180 to foster and advance the best interests of those engaged in the wholesale distribution of cigars, cigarettes, candy, tobacco and smokers' requisites and sundries by promoting and maintaining high standards on the part of such distributors. Twenty-one Massachusetts companies and one New York company engaged in the distributing business comprise MCTD's membership.

2. In 1991, MCTD paid a lobbyist $12,000 to monitor legislative developments in Massachusetts. MCTD is opposed to any legislative measure that would increase the cost of doing business in its industry, such as increased unemployment insurance premiums or cigarette tax hikes. MCTD paid the lobbyist an additional $10,500 in 1991 to actively promote an amendment to G.L. c. 64C, §13(c).[1/]

3. On August 13, 1991, MCTD hosted its third annual Sweet Charity Golf and Tennis Invitational (Invitational) at the Ocean Edge Resort in Brewster, Massachusetts.

4. The Invitational included a barbecue lunch, an afternoon of golf or tennis, a cocktail hour, a clambake dinner and a post-dinner raffle to benefit the Jimmy Fund.

5. Attendance at the event was by invitation only. MCTD extended invitations to its members, representatives of their wholesale suppliers and approximately 180 members of the state Legislature. Roughly 160 individuals attended the invitational, including over 50 state legislators, staffers and members of their families.

6. Attendance at the Invitational was free.[2/] MCTD spent just over $29,000 in hosting the event. Attendees who participated in all the day's events received an estimated $141-$152 on average each in free food, alcohol, golf and entertainment. Many attendees participated in the Jimmy Fund raffle, which raised $6,338.27, and thus "paid" in some fashion for a portion of their attendance costs by contributing on average $35.

7. The Invitational served a variety of purposes. MCTD used the Invitational as a way to bring together its members for an enjoyable social gathering. MCTD also employed the event as a means by which its industry could enhance its image with the Legislature. Finally, the MCTD utilized the Invitational to raise money for

charity.

8. Section 3(a) of G.L. c. 268A prohibits, other than as provided by law, the giving of anything of substantial value to any state employee for or because of any official act performed or to be performed by such employee.[3/]

9. The Commission has held that private parties violate §3 when in an effort to generate good will they entertain government officials who are in a position to benefit them. *See, e.g., In re State Street Bank*, 1992 SEC 580; *In re Stone and Webster*, 1991 SEC 522; *In re Rockland Trust*, 1989 SEC 416; *see also Commission Fact Sheet: Business and Entertainment Expenses for Public Officials* (following the U.S. Trust Public Enforcement Letter, *P.E.L. 89-1*, the Commission included the payment of fees for recreational activities such as golf as a prohibited activity).

10. By providing a free day's outing to over 50 legislators, staffers and family members with an intent[4/] of enhancing their industry image with the Legislature when the legislators were in a position to benefit it, MCTD violated §3(a).

11. MCTD asserts that its primary purposes for hosting the Invitational were to provide a social event for its employees and raise money for charity. The Commission will not consider a gift to have been given "for or because of an official act" where a subject establishes that a legitimate purpose was *the* motive for the gift. *In re Ackerley Communications*, 1991 SEC 518, 520 n. 5. Where a legitimate purpose only partially motivates a gift, the gift is prohibited if the giver is also motivated by a desire to create official good will, as MCTD concedes was the situation in the instant case.[5/]

In view of the foregoing violations of G.L. c. 268A by MCTD, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by MCTD:

1. that MCTD pay to the Commission the sum of two thousand dollars ($2,000.00) as a civil penalty for violating G.L. c. 268A, §3; and

2. that MCTD waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

Date: October 14, 1992

[1/]General Laws c. 64C prohibits predatory cigarette pricing. The amendment sought to refine the definition of cigarettes' "cost to wholesalers." The amendment was inserted as an outside section of the FY 1992 general appropriations act, which was approved by both chambers of the legislature and then signed into law by the Governor on July 10, 1991. Mass. St. 1991, c. 138, §377. Due to a language error, however, the amendment to G.L. c. 64C, §13(c) was rendered ineffective.

[2/]MCTD paid for the Invitational by soliciting donations from its wholesale suppliers.

[3/]In the past, the Commission has considered entertainment expenses totalling $50 or more to constitute "substantial value." *Public Enforcement Letter 88-1. See, Commission Advisory No. 8* issued May 14, 1985. Furthermore, for §3 purposes it is unnecessary to prove that any gratuities given were generated by some specific identifiable act performed or to be performed. In other words, no specific *quid pro quo* or corrupt intent need be shown. Rather, the gift may simply be an attempt to foster goodwill. It is sufficient that a public official, who was in a position to use his authority in a manner which would affect the giver, received a gratuity to which he was not legally entitled, regardless of whether or not that public official ever actually exercised his authority in a manner that benefitted the gift giver. *See Commission Advisory No. 8. See also United States v. Standefer*, 452 F. Sup. 1178, (W.D.P.A. 1978), aff'd other grounds, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455, 479-482 (5th Cir. 1978).

[4/]While MCTD intended to enhance its image with the Legislature, the Commission found no evidence that it intended to violate the conflict of interest law. Ignorance of the law, however, is no defense to a violation of the conflict law. *See, e.g., Scola v. Scola*, 318 Mass. 1, 7 (1945); *In re Burgess*, 1992 SEC 570; *In re Doyle*, 1980 SEC 11, 13.

[5/]MCTD also points to the law applicable to federal legislators, which does not consider the waiver of fees and payment of travel expenses a gift where a member of congress plays as a "celebrity" in a golf tournament and provides substantial services to the sponsor to help attract a maximum amount of paying customers. *H.R. Report 95-1837*, p.9; *Ethics Manual for Members, Officers, Employees of the U.S. House of Representatives*, pp.37-8. MCTD asserts that the state legislators it invited likewise provided a celebrity-draw service. The

Commission, however, does not share MCTD's view. Whatever celebrity service the legislators provided, it cannot be considered substantial since they gave no speeches on behalf of the Jimmy Fund, sold no tickets at the raffle and their participation was not even noted in the event's invitations or programs. Moreover, the Invitational was not designed strictly as a fundraiser to maximize the amount of money raised for charity as MCTD knew from prior invitationals that their "take" from the raffle would not cover the costs of allowing participants to attend the event for free.